IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

150.29 ACRES OF LAND, MORE OR LESS, IN MILWAUKEE COUNTY, WISCONSIN, and VLASTA KRIZ, et al.,

Defendants.

ELINE'S INC.,
Petitioner and Appellant Below

vs.

LAKESIDE LABORATORIES, INC.,
Respondent and Appellee Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

The rulings of the District Court, Judge F. Ryan Duffy presiding, were made during the trial and in respect to the claim of so called "ready-to-go" value appear on pages (R 55, 173-174, 218, 278, 288, 320, 408, 411-412 of the record, in respect to the inapplicability of the sale clause on page 409 of the record, and in respect of the inapplicability of the condemnation clause on pages 301, 329, 347, 409 of the record.

The majority and minority opinions of the Circuit Court of Appeals for the Seventh Circuit were filed March 5,

1945, and appear at page 495 of the record. They are reported in 148 Fed (2) Adv. Op. 39.

JURISDICTION

This has already been stated in the petition at page 2 which is hereby adopted and made a part of this brief.

SUMMARY STATEMENT

The essential facts of the case are set forth in the accompanying petition for writ of certiorari, and in the interest of brevity are not repeated here. Any necssary elaboration of the evidence on the points involved will be made in the course of the argument which follows:

SPECIFICATION OF ERRORS TO BE URGED

The Court below erred:

A. In allowing as part of just compensation where real estate (an entire leasehold) only is condemned by the United States so-called "ready-to-go" value, which is a value over and above the fair market value of the real estate, and which was based upon what an alleged purchaser of the interest in real estate combined with the equipment and business would be willing to pay in order to go into possession and continue production and avoid all delays, expense and inconvenience incidental to getting the equipment operating, and which was arrived at by an estimate of the value of attainable future profits of a pharmaceutical business to be operated on the real estate.

B. In holding that a lessee was entitled to claim the reproduction cost of improvements and cost of installing machinery (Exhibit 26, R 67, 71-73, 78-79, 276-277, 284) unaccompanied by testimony as to the value of the use,

when under the term of the lease (R 417, 429) all improvements made by lessee were lessor's property subject to use the same during the remainder of the demised term.

C. In holding that the compensation payable to the respondent by the United States was not limited by the sale clause of the lease.

D. In holding that condemnation by the United States was not within the scope of the condemnation clause.

SUMMARY OF ARGUMENT

POINT A

The Circuit Court of Appeals has construed the decision of this Court in the General Motors Case, 65 S. Ct. 357, 89 l. ed. 379 as overruling Mitchell v. U. S. 267 U. S. 341, Bothwell v. U. S. 254 U. S. 231, U. S. ex rel T.V.A. v. Powelson, 319 U. S. 266, and long line of cases all to the effect that loss of profits, inconvenience, and consequential damages are not to be compensated for in condemnation.

Lakeside's witnesses found no enhancement in the rental value of the original cafeteria lease. Lakeside's witnesses admitted that the annex erected by Lakeside costing about $21,000 would have a thirty-five cent rental value per square foot per year (the same as the original cafeteria) (R 198, 251-252) but they did not value it for the balance of the term on a fair rental basis. The total reproduction cost of the improvements added by Lakeside, including the improvements in the original cafeteria, cost of the annex, and the cost of installing the laboratory equipment was $41,762.92 (R 446). The verdict of $48,331.35 was in excess of the total value of the improvements in the cafeteria building, the cost of the annex and the cost of installation, even if we assume for the purpose of argument that the value of the use of these improvements might be taken as the reproduction cost of the same. Part of the award is

"ready-to-go" value based solely upon testimony ascribing a special value to the leasehold by assuming a sale or offering of the lease in combination with the business and equipment of the lessee (which equipment the lessee was compelled to remove under the lease (R 419)), because the alleged purchaser could immediately produce pharmaceutical products and avoid all delays, expenses and inconvenience incidental to getting the pharmaceutical plant operating. Lakeside moved its business and has it and all its equipment operating elsewhere. Its only loss, whether characterized as so-called "ready-to-go" value, or good will, is nothing more than that intangible benefit to a business of continuing in its present location and thus avoiding loss of profits, inconvenience and delay, which goes with moving. This Court has ruled many times that these losses are not compensable and has re-affirmed this ruling in the *General Motors Case,* 65 S. Ct. 357, 89 1. ed. 379, 383.

The majority opinion of the Circuit Court of Appeals quotes the *General Motors Case* 65 S. Ct. 357, 89 1. ed. 379, and particularly that portion referring to the unusual situation there presented because of the fact that only a portion of the sublease was taken and it was necessary for General Motors to move out and in. The opinion of the Circuit Court of Appeals entirely overlooks the following portions of this Court's decision in the *General Motors Case*:

> "The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, *the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign.* No doubt all these elements would be considered by an owner in determining whether, and at what price, to sell. No doubt, there-

fore, if the owner is to be made whole for the loss consequent on the sovereign's seizure of his property, these elements should properly be considered. But the courts have generally held that they are not to be reckoned as part of the compensation for the fee taken by the Government. We are not to be taken as departing from the rule they have laid down, which we think sound." (Page 383).

"*When it takes the property, that is, the fee, the lease, whatever he may own,* terminating altogether his interest, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of 'consequential damage' as that conception has been defined in such cases. Even so the consequences often are harsh. For these whatever remedy may exist lies with Congress." (page 384).

(Italics ours)

This court further pointed out (page 384) that the *General Motors Case,* where it was necessary to move out and back as the entire lease was not taken, is entirely different from a situation where the fee or entire lease is taken. In this case the entire fee and entire Lakeside lease was taken. If there is anything in the *General Motors Case* which overrules the long line of authorities of this court that consequential losses are not compensable under the Fifth Amendment, then it is submitted that a question of general importance is presented by the instant case which should be decided by this court. With the possible exception of the *General Motors Case* as construed in the *Eline Case* there are no decisions of the Federal Court supporting a so-called "ready to go" value or intangible value resulting from the fact that it is not necessary to move and production will not be interrupted.

In *Mitchell v. U. S.* 267 U. S. 351 this court denied an owner compensation for the destruction of his business,

which resulted from the taking of his land for public project, even though his business could not be re-established elsewhere. See also:

Bothwell v. U. S. 254 U. S. 231 to the same effect. This court had occasion in *U. S. ex rel T.V.A. v. Powelson,* 319 U. S. 266, 281, to review the long line of decisions of this court relating to consequential losses, and there again stated:

> "There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment . . . 'There is no finding as a fact that the Government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land.' 267 U. S. p. 345. That which is not 'private property' within the meaning of the Fifth Amendment likewise may be a thing of value which is destroyed or impaired by the taking of lands by the United tSates. But like the business destroyed but not 'taken' in the Mitchell Case it need not be reflected in the award due the landowner unless Congress so provides."

This Court further said (page 282) that "going concern value of the enterprise" is only a part of just compensation where business is taken.

In the *General Motors Case,* 65 S. Ct. 357, 89 1. ed. 379, 383 this court re-affirmed the rule established in the foregoing cases.

Lakeside attributes all the values of the operation of the business to the leasehold and not to the earning power of the equipment, good-will and business management. The equipment is set up and operating elsewhere. Lakeside is still in the pharmaceutical business. The fact that Lakeside's business in Milwaukee might have been sold at a profit is not determinative of the value of the leasehold upon which the business is conducted. Certainly there is no

warrant for charging Eline's with losses necessary to moving when under the lease Lakeside would have been forced to move at a later date. Whether so-called "ready-to-go" value is applied to a fee taking or leasehold taking it represents the advantage to an owner of continuing in the existing location rather than being subjected to the inconvenience of moving. Whatever label is used, it is actually a form of recovery for losses and expenses produced by moving. The fact that it is a business loss rather than a value inherent in the real estate is demonstrated by the fact that Lakeside's witnesses as to "ready-to-go" value admitted that if the business was not making money, there would not be a "ready-to-go" value (R 216, 234).

This evidence was received over objection (R 208, 210, 212, 215-216, 218, 225, 230, 234, 235). Eline's motion to strike was overruled (R 218-219, 235) and the evidence was allowed to stand before the jury (R 411). The jury was instructed that the evidence remained in the case (R 411).

The majority opinion of the Circuit Court of Appeals (R 497) points out that the instructions of the trial court clearly defined the theory of valuation as the difference between the market value of the use for the balance of the term minus rent payable. Eline's has no quarrel with the instruction of the trial court, but the instructions could not cure an award where everything over $40,000 is of necessity based upon so-called "ready-to-go" value. The Circuit Court of Appeals avoided discussing the real issue in the case—namely, is "ready-to-go" value part of just compensation, but on the basis of the General Motors Case held that it was. The majority decision of the Circuit Court of Appeals necessarily holds that "ready-to-go" value may be included as part of just compensation because absent that

element of "ready-to-go" value, there is no evidence to support a verdict of more than $40,000.

Eline's entered into an agreement with the Government on the assumption that all the ordinary rules as to limitations of compensable losses applied, but now under the Circuit Court of Appeals decision it has been ruled that such consequential losses are compensable when an entire leasehold is taken. If this decision is a standard for the future, then the same mathematical process can be used on fee property of which the owner is the occupant and upon which he conducts a business. If this decision stands, the United States will be subjected to tremendous claims of a type not heretofore allowable for damages in condemnation cases and all the rules of law laid down by this Court as to limitation of such claims will be circumvented. Indirectly recovery for these losses may be made by using these losses to value a fee or a leasehold, whereas directly they are not compensable under the Fifth Amendment. Lakeside indirectly recovered for loss of profits, inconvenience, and delay forbidden elments of compensation in condemnation, by valuing the leasehold in connection with a combined sale of the business and leasehold. The effect of such evidence on the cost to the government of condemning leaseholds is illustrated by a comparison of the award in this case of $48,331.35 to the undisputed testimony that the value of the cafeteria and annex together with the land had a market value of $45,000; deducting $5,000 for the land leaves a value for the cafeteria and annex of about $40,000 (R 317, 320, 350, 352). Lakeside's own real estate expert was forced to admit the unsoundness of its claim when he stated that the tenant's rights were greater than if "Lakeside had a deed" (R 266).

POINT B

Decision of Circuit Court of Appeals as to improvements, cost of annex and cost of installing laboratory equipment claimed by lessee is in conflict with other federal cases, and is an important question of law in condemnation which should receive ultimate determination.

Exhibit 26 (R 67, 71-73, 78-79, 276, 277-284, 445-453) showing reproduction cost of improvements in the cafeteria building, the cost of erection of the annex, and cost of installing machinery, was admitted in evidence over Eline's objection (R 67, 71-73, 78-79, 276-277, 284). Lakeside's own experts admitted they made no attempt to appraise the value of the use of the improvements (R 144-145, 246, 251). The trial court seriously questioned the admissibility of this evidence (R 67, 71-72, 78, 406-407).

The Circuit Court of Appeals approved of the admission of Exhibit 26 because the trial court told the jury to consider it with caution. The jury was therefore allowed to guess as to the use value. The correct instructions by the trial court as to use value could not cure the prejudicial admission of Exhibit 26 without testimony as the value of the use.

The decisions all hold that under lease provisions such as in this case the lessee is entitled to only use value as a part of just compensation.

Carlock v. U. S. 53 Fed. (2) 926, 927 (CCA D. C.)
U. S. v. Certain Parcels of Land, 54 Fed. Supp. 561, 562.
Corrigan v. Chicago, 144 Ill. 537, 33 N. E. 746.
Fiorini v. Kenosha, 208 Wis. 496, 243 N. W. 761.

If this decision of the Circuit Court is to stand, when the Government condemns an entire leasehold, it will have to pay the reproduction cost of the improvements and the

cost of installing machinery by a lessee, because the lessee will claim the entire cost and ignore proving the use value of the improvements during the balance of the term of the lease.

The cost of installing laboratory equipment ($3,820.32) (R 446) is not compensable because it is an item of consequential damage where the entire lease is taken.

POINT C

The decision of the Circuit Court of Appeals involves an important question of federal law which should receive ultimate determination.

The modification agreement contained a sale clause (R 428) to the effect that at any time during the year following September 30, 1943, on four months' written notice, in the event of a sale of the Eline plant, or the portion occupied by Lakeside, Lakeside was required to vacate and accept $4,500, or amounts scaling down to $800 over the remaining years of the extended term.

On the day the petition for condemnation was filed, the District Court entered an order of immediate possession of the unoccupied portion as of April 30, 1942 (R 7). Lakeside was given prompt notice of the condemnation (R 292, 293, 457). On June 16, 1942 Eline's gave the United States, at its request, a written option to purchase the property pursuant to 50 U.S.C.A. 171. This option was accepted by the Government on August 1, 1942 (R 15). The option provided that if the Government did not desire to take title by deed, it might file a declaration of taking, the price in the option in that case to control.

A long line of cases have held that a condemnation is a sale.

American Creameries v. Armour, 149 Wash. 690, 271 Pac. 896.

United States v. Certain Parcels of Land, 51 Fed. Supp. 811.

Vandermulen v. Vandermulen, 108 N. Y. 195, 15 N. E. 383.

Atlanta, Knoxville and Northern R. R. v. So. Ry. Co. (CCA) 131 Fed. 657.

Jackson v. State, 213 N. Y. 34, 106 N. E. 751.

Bell Telephone v. Parker, 187 N. Y. 299, 79 N. E. 1008.

The majority opinion of the Circuit Court of Appeals holds that because the parties failed in the condemnation clause to expressly name the United States, condemnation by the United States could not be a sale within the terms of the sales clause. If the condemnation clause was limited as claimed by the majority opinion, it performs no functions in the case and the sales clause is to be construed as if the condemnation clause were excised from the lease. The two provisions were complementary and meant to exhaustively cover the lessee's interest in the property. There is no conflict or inter-relationship between the condemnation clause and the sales clause. Both may stand without either impinging on the other.

A number of Federal decisions have held that the option agreement used in this case created a binding vendor-vendee relationship between the government and the property owner.

U. S. v. Scott, 140 Fed. (2) 941 (CCA 8).

Wachovia Bank and Trust Company v. U. S. 98 Fed. (2) 609 (CCA 4).

U. S. v. 325 *Acres of Land,* 53 Fed. Supp. 884.

In Danforth v. U. S. 308 U. S. 271, 282, this court, speaking of this type of option said:

> "We have no doubt that the authority to purchase given to the Secretary of War is sufficiently broad to authorize a purchase of petitioners' interest in land subject to perfecting the title through condemnation."

POINT D

The decision of the Circuit Court of Appeals holding that the United States is not a corporation within the meaning of the condemnation clause involves an important question of federal law which should receive ultimate determination.

The condemnation clause (Clause 13) provides:

> "Lessee further agrees that if at any time during the term of this lease the said premises, or any part thereof, shall be acquired or condemned and/or purchased by any municipality or political subdivision of the state wherein said premises are located, or by any company or corporation lawfully qualified to exercise the right of eminent domain, the lessor shall have the right to cancel and terminate this lease by giving to lessee not less than four months written notice of such intention to cancel, and in the event of any such acquisition or condemnation of said premises or any part thereof, the lessee shall, and as part of the consideration hereof, does hereby asign to lessor all of lessee's claims, rights and causes of action on account thereof, together with all of the lessee's right, title and interest, under and by virtue of this lease." (R 419).

A long line of cases hold that the United tSates is a corporation.

U. S. v. Maurice, 109 Fed. Case 15, 747, 2 Brock U. S. 96.

Helvering v. British, American Tobacco Co. 69 Fed. (2) 528, 530.

Helvering v. Stockholms Enskilda Bank, 293 U. S. 84, 92.

Respublica v. Sweers, 1 U. S. 41, 1 Dall. 41.

Cotton v. U. S. 11 Haw. 229, 331.

Stanley v. Schwalby, 147 U. S. 508, 517.

The decision of the Circuit Court to the effect that the United States is not a corporation within the terms of the clause is based principally on *U. S. v. Cooper,* 312 U. S. 600. An analysis of the *Cooper Case* and later decisions of the court show that this case does not so hold. The *Cooper Case* involved the Construction of the word "person" defined in the Sherman Act as follows:

> "The word 'person or persons' whenever used * * * shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the Laws of any of the territories, the laws of any state or the laws of any foreign country."

All the court held was that under this definition the United States could not be treated as a corporation organized under its own laws and could not exist under itself. (In Clause 13 the word "corporation" is not qualified as in the above definition.) The majority opinion of this court does not deny the corporate status of the United States but merely holds that it is not within the class of corporations to whom the benefits of the act were intended to be extended.

This Court had occasion recently in the case of *Parker v. Brown,* 317 U. S. 341, 87 L. ed. 235, 241 to consider the *Cooper Case* in this respect and said:

> "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. The

act is applicable to 'persons' including corporations (Sec. 7), and it authorizes suits under it by persons and corporations (Sec. 15). A state may maintain a suit for damages under it, Georgia v. Evans, 316 U. S. 159, 86 L ed. 1346, 62 S.Ct. 972, but the United States may not, United States v. Cooper Corp. 312 U. S. 600, 85 L. ed. 1071, 61 Sup. Ct. 742—conclusions derived not from the literal meaning of the words 'person' and 'corporation' but from the purpose, the subject matter, the context and the legislative history of the statute."

In the recent case of *State of California v. U. S.* 320 U. S. 577, 585 this court held that the State of California fell within the term "person" which is defined as "corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District or Possession thereof or of any foreign country" (46 U.S.C.A. 801). This court pointed out that a different construction "would have such dislocating consequences."

Under the position taken by the Circuit Court of Appeals condemnation exercised through any corporation created either by the United States or the State of Wisconsin would fall within the clause, while a condemnation which was carried on directly by the United States or the State of Wisconsin rather than by a delegated agency or instrumentality would not fall within the clause.

VAN B. WAKE
773 North Broadway
Milwaukee 2, Wisconsin

Of Counsel:
JAMES D. SHAW
SHAW, MUSKAT AND PAULSEN
773 North Broadway
Milwaukee 2, Wisconsin
and
FRANCIS H. PARSON
BACKUS AND PARSON
735 North Water Street
Milwaukee 2, Wisconsin